

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

JESSE LEE JOHNSON,  
Defendant-Appellant,

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Appeal from the Judgment of the Marion County Circuit Court  
The Honorable Channing J. Bennett, Judge

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Marion County Circuit Court  
98C46239

A167124

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BRIEF OF *AMICUS CURIAE*  
INNOCENCE NETWORK

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## I. INTEREST OF AMICUS CURIAE

*Amicus curiae* the Innocence Network (“the Network”) has a professional interest in this Court’s consideration of the statutory and policy issues involved in this case, particularly in explaining the importance of post-conviction DNA testing to prove actual innocence.

The Network is an affiliation of organizations dedicated to redressing the causes of wrongful convictions and providing pro bono legal and investigative services to individuals seeking to prove their innocence of crimes for which they have been convicted. The Network comprises 84 organizations representing clients in all 50 states, the District of Columbia, and Puerto Rico, as well as Argentina, Australia, Canada, France, Ireland, Israel, Italy, The Netherlands, New Zealand, South Africa, and the United Kingdom.

The Network and its members are dedicated to improving the accuracy and reliability of the criminal justice system to prevent future wrongful convictions. Post-conviction DNA testing has played a significant role in many of the exonerations Network members have accomplished. Drawing on its extensive experience with wrongful convictions, the Network advocates for post-conviction DNA testing when results might match a third party, even though the defendant is already excluded. Accordingly, this case implicates the Network’s interest in ensuring that inmates who are actually innocent have access to the full opportunities post-conviction DNA testing provides.

## II. INTRODUCTION

Since the advent of DNA testing in 1985, biological material has emerged as the most reliable physical evidence at a crime scene, particularly those involving sexual assaults or crimes of violence. The first DNA exoneration took place in 1989. *DNA Exonerations in the United States*, The Innocence Project.<sup>1</sup> In the 28 years since, DNA testing has resulted in 359 exonerations. *Id.* Collectively, these exonerees served 4,926 years of wrongful imprisonment, with 20 of the exonerees on death row at the time of their exoneration. *Id.* Additionally, in 155 of these cases, DNA testing has identified the true suspect or perpetrator. *Id.*

Every state in the country has enacted a post-conviction DNA testing statute. *Access To Post-Conviction DNA Testing*, The Innocence Project.<sup>2</sup> These statutes work both to prevent wrongful convictions *and* to help identify the true perpetrators of crimes.

The Network agrees with Defendant-Appellant Jesse Lee Johnson that the Circuit Court's interpretation of Oregon's Post-Conviction DNA Testing Statute (ORS 138.690 *et seq*) is too narrow and legally erroneous. Contrary to the Circuit Court's interpretation, there is a reasonable possibility that further DNA testing in this case would lead to a finding that Mr. Johnson is actually

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<sup>1</sup> Available at <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (accessed June 25, 2018).

<sup>2</sup> Available at <https://www.innocenceproject.org/access-post-conviction-dna-testing/> (accessed June 25, 2018).

innocent. In numerous similar cases, such testing has led to exonerations, along with the apprehension of the real perpetrator. As such, the Circuit Court's interpretation of the statute imposes inappropriate burdens on wrongfully convicted individuals and frustrates the purpose of the statute. *Amicus* the Network requests that this Court reverse the Circuit Court's holding and grant Mr. Johnson's request for DNA testing.

### **III. STATEMENT OF THE CASE**

*Amicus* the Network adopts the Statement of the Case in the Opening Brief filed by Defendant-Appellant Jesse Lee Johnson.

### **IV. ARGUMENT**

#### **A. The Court Should Endorse a Liberal Interpretation of the DNA Testing Statute to Effectuate its Purpose**

Post-conviction DNA testing statutes, such as the Oregon law at issue here, are remedial statutes that should be interpreted liberally in favor of the class of citizens who were intended to directly benefit therefrom, namely, those wrongly convicted of a crime. *See, e.g., In re Payne*, 129 A3d 546, 554 (Pa Super Ct 2015); *Gregg v. State*, 409 Md 698, 715 (2009). Courts should refrain from interpreting such statutes in a manner that puts the burden on the wrongfully convicted person to effectively solve the crime and prove that DNA evidence promises to implicate another person. This is especially true when, as here, the statute itself dictates that the trial court *assume* exculpatory results in evaluating a motion for DNA testing. *See* ORS 138.692(4)(d).

Oregon’s post-conviction DNA testing statute, like similar statutes in other states, permits DNA testing when there is a “reasonable possibility” that further testing would result in a finding of actual innocence assuming the testing produces exculpatory results. The threshold question for courts when interpreting such DNA testing statutes is not the likelihood of proof of innocence, but whether it is within the realm of reason that some results could prove innocence. *State v. Romero*, 274 Or App 590, 597-98 (2015) (“[I]n assessing whether a defendant has made a prima facie showing that exculpatory DNA evidence would establish ‘actual innocence,’ we are called upon to assess whether there is *some* likelihood that such evidence would *give rise to reasonable doubt* about the defendant’s guilt.”); *see also Powers v. State*, 343 SW 3d 65, 55 (Tenn 2011) (“[T]he trial court should postulate whatever realistically possible test results would be most favorable to [the] defendant in determining whether he has established’ the reasonable probability requirement under that jurisdiction’s DNA testing statute.”) (quoting *State v. Peterson*, 836 A2d 821, 827 (NJ Super Ct App Div 2003)); *In re Payne*, 129 A3d at 563 (post-conviction DNA statute “demands an inquiry into whether there is no reasonable possibility that the testing would produce exculpatory evidence to establish petitioner’s actual innocence not whether a particular result, or category of results would entitle him to a new trial”) (internal citations and quotations omitted).

It is not difficult to imagine DNA test results that could dramatically affect the soundness of a jury's verdict. For example, DNA results might match a previously unknown suspect for a burglary-murder. If that suspect had a history of murders or violent behavior and further investigation revealed the suspect had an opportunity to commit the crime, DNA results would demonstrate the reasonable possibility of "actual innocence" and conflict with the jury's verdict.

Inevitably, determining whether an individual should be afforded DNA testing involves some conjecture. It is difficult, if not impossible, to anticipate what results DNA testing might produce in advance of actual testing. An actually innocent defendant has no more information about the source of DNA than the prosecutor; his defense is based as much on speculation and circumstantial evidence as the prosecutor's theory. A burden of "reasonable possibility," therefore, does not mean "likely probability." *See, e.g., Strickland v. Washington*, 466 US 668, 694, 104 S Ct 2052, 2068, 80 L Ed2d 674, 698 (1984) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). The very purpose of a post-conviction DNA testing statute must be to afford a defendant the *opportunity* to demonstrate the unlikely. *See, e.g., Romero*, 274 Or App at 598 ("The gist of the whole inquiry is that the DNA evidence might cause jurors to see things differently and have doubt about the defendant's guilt.").

**B. The Evidentiary Strength of DNA Testing Compared to Other Sources of Evidence Justifies a Low Threshold to Access Testing**

Even in cases with substantial or even seemingly overwhelming evidence of guilt—and, by definition, every convicted individual has been found guilty “beyond a reasonable doubt”—DNA testing has the potential to disprove guilt. DNA testing can, indeed, reveal uncomfortable truths about police and prosecutorial misconduct. *Halsey v. Pfeiffer*, 750 F3d 273, 285 (3rd Cir 2014). It can demonstrate the unreliability of forensic evidence thought to be sound. *United States v. Gates*, No. F-6602-81, Certificate of Actual Innocence (DC Super Ct May 4, 2010) (reversing conviction obtained based upon testimony that a hair “matched” a hair found on victim). And it can bring to light unattributable but grotesque error. *Illinois v. Gonzalez*, No. 94-CF-1365, Order (Ill Cir Ct Lake Cnty Mar 9, 2015) (reversing conviction for rape and abduction based on eyewitness misidentification).

When biological evidence could exonerate a convicted individual, the letter and spirit of the DNA Statute require testing despite the weight of the seemingly “overwhelming” evidence. See Hilary S. Riter, *It’s the Prosecution’s Story, But They’re Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Cases*, 74 Fordham L Rev 825, 834 (2005) (“In many cases where convictions appeared to be based

on solid, and in some cases overwhelming, evidence, results of post-conviction DNA testing have proven actual innocence.”).

Ostensibly overwhelming evidence of guilt can be inaccurate for many reasons. For example, much of what has passed historically as reliable scientific evidence, such as hair comparison analysis, bite mark comparisons, firearm tool mark analysis and shoe print comparisons, have never been scientifically validated. *Misapplication of Forensic Science*, The Innocence Project.<sup>3</sup> Many studies have proven that eyewitness identifications, a factor in approximately 75-80% of wrongful convictions, are prone to error. *Eyewitness Misidentification*, The Innocence Project.<sup>4</sup> Even in cases in which the defendant confessed or made inculpatory statements under police interrogation—as is alleged in the present case—such statements may later prove to be false, particularly when the defendant is young or mentally challenged—in about 25% of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright confessions, or pled guilty. *False Confessions or Admissions*, The Innocence Project.<sup>5</sup> Additionally, incentivized testimony—including particular incentives that are not disclosed to the jury—were critical evidence used to convict an innocent person in more

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<sup>3</sup> Available at <https://www.innocenceproject.org/causes/misapplication-forensic-science/> (accessed on June 26, 2018).

<sup>4</sup> Available at <https://www.innocenceproject.org/causes/eyewitness-misidentification/> (accessed on June 26, 2018).

<sup>5</sup> Available at <https://www.innocenceproject.org/causes/false-confessions-admissions/> (accessed on June 26, 2018).

than 15% of wrongful conviction cases. *Incentivized Informants*, The Innocence Project.<sup>6</sup> In short, there are myriad contributing factors to wrongful convictions, but DNA testing has the potential to prove actual innocence.

For these reasons, several other courts have recognized that the apparent strength of the prosecution's case is not a reason to deny a defendant access to DNA testing that could potentially exonerate him. *See, e.g., People v. Henderson*, 799 NE 2d 682, 690 (Ill App Ct 2003) (ordering post-conviction DNA testing despite the court's agreement that the evidence against the defendant "was indeed overwhelming," because Illinois' post-conviction DNA testing statute is not limited to cases "where the proposed scientific testing will, by itself, completely vindicate a defendant"); *State v. Peterson*, 836 A2d 821, 826 (NJ Super Ct App Div 2003) (under New Jersey's post-conviction DNA testing statute, "the strength of the evidence against a defendant is not a relevant factor in determining whether his identity as a perpetrator was a significant issue"); *Bruner v. State*, 88 P3d 214, 216 (Kan 2004) (holding that, under Kansas' post-conviction DNA testing statute, it is improper to deny testing on the basis that the evidence was overwhelming).

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<sup>6</sup> Available at <https://www.innocenceproject.org/causes/incentivized-informants/> (accessed on June 26, 2018).

**C. DNA Testing Can Establish “Actual Innocence” By Detecting a Redundant DNA Profile on Multiple Pieces of Evidence**

A defendant may use DNA testing to demonstrate “actual innocence” by discovering a redundant unknown DNA profile on multiple pieces of evidence. If a genetic profile is detected on multiple items of physical evidence known to be manipulated by the perpetrator of a crime, this “redundancy,” as it is known, will establish and confirm the genetic profile of the true assailant and conclusively establish that the DNA profile belongs to the true assailant. DNA testing of these items provides powerful proof of a defendant’s actual innocence if it reveals that the same person—someone other than the defendant—left DNA on multiple items of probative evidence that the assailant touched. These multiple DNA “touches” could conclusively demonstrate that the DNA detected is from the perpetrator, rather than from casual contact unrelated to the offense. A defendant may produce such potential exonerative evidence even when the defendant has already been excluded as the source of DNA evidence. *In re Payne*, 129 A3d at 561-62. The Circuit Court’s holding improperly ignores the very real (not just “reasonable”) possibility that DNA testing could establish Johnson’s “actual innocence” by demonstrating just such a redundancy.

**D. DNA Testing Often Establishes the “Actual Innocence” of a Defendant by Establishing a Profile that Matches a Profile in CODIS**

In addition to having the potential to exonerate a defendant, DNA testing has the potential to identify the actual culprit through the use of DNA

databases, in particular the Combined DNA Index System (“CODIS”). Indeed, sixty-five of the first 250 post-conviction DNA exonerations in the United States included a “cold hit” to the actual perpetrator of the crime in a state or federal DNA database. Brandon L. Garrett, *DNA and Due Process*, 78 *Fordham L Rev* 2919, 2931, n 97 (2010). Justice is not served by having innocent people in jail and the guilty on the street.

Current forensic DNA testing methods do not reveal any expressed genetic information or physical characteristics of a person. John Roman, Ph.D., et al., *Post-Conviction DNA Testing and Wrongful Conviction*, Urban Institute Justice Policy Center, 10 (2012).<sup>7</sup> Instead, the tests merely act as an identifying mechanism that forensic scientists can then use to determine if there is an association between the evidence sample and a particular person. *Id.* Once an association is made, law enforcement agencies use the association to aid investigations and prosecutions. *Id.* The effect of the DNA association on any criminal investigation, and in any investigation of a wrongful conviction, is dependent on the probative value of the evidence and the context of the investigation. *Id.*

Analysts use CODIS to search DNA profiles obtained from crime scene evidence against DNA profiles from other crime scenes and from convicted

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<sup>7</sup> Available at <https://www.ncjrs.gov/pdffiles1/nij/grants/238816.pdf> (accessed on June 26, 2018).

offenders and arrestees. *What is CODIS?*, National Institute of Justice.<sup>8</sup>

CODIS can generate investigative leads in cases when a match is obtained. *Id.* For example, if the DNA profile from a crime scene matches a sample taken from a convicted offender or arrestee, the individual may be linked to the crime in what is called an offender hit. *Id.* The submission of DNA testing to CODIS, therefore, is a critical step in fully developing a case, even when a defendant already has been excluded as the source of DNA.

As of April 2018, the Combined DNA Index System (“CODIS”) contains over 13,333,340 offender profiles and 3,102,446 arrestee profiles. *CODIS-NDIS Statistics*, Federal Bureau of Investigation.<sup>9</sup> Oregon alone has 202,672 offender profiles. *Id.* CODIS has produced over 418,466 hits assisting in more than 402,587 investigations. *Id.* More than 8,000 of those investigations were in Oregon. *Id.*

Other courts have endorsed DNA testing in cases when CODIS could establish actual innocence. For example, the Tennessee Court of Criminal Appeals reaffirmed that “‘realistically possible’ DNA test results include the possibility that testing will not only fail to identify the petitioner’s DNA on the item tested but will also simultaneously identify the DNA profile of another known sex offender from the CODIS database.” *State v. Nelson*, W2012-

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<sup>8</sup> Available at <https://www.nij.gov/journals/266/pages/backlogs-codis.aspx> (accessed on June 25, 2018).

<sup>9</sup> Available at <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics> (accessed on June 25, 2018).

00741-CCA-R3CD, 2014 WL 295833, \*7 (Tenn Crim App Jan 27, 2014); *see also Powers*, 343 SW 3d at 53 (affirming that CODIS allows DNA from a crime scene to potentially match a previously unsuspected individual, which could allow the defendant to show the unsuspected individual acted alone, or at least give a better opportunity to create reasonable doubt about his conviction).

In this evolving world of increased DNA data collections, increasing accuracy and specificity of DNA testing, and increased reliance on DNA testing by law enforcement agencies, courts should not summarily preclude defendants from using the enormous resource of DNA data banks to demonstrate their actual innocence. *See In re Payne*, 129 A3d at 565.

#### **E. Post-Conviction DNA Testing Leads to Findings of Actual Innocence**

Several cases highlight the crucial role of post-conviction DNA testing in establishing a convicted defendant's actual innocence and revealing the identity of the actual perpetrator. As these cases indicate, additional DNA testing often does lead to the discovery of additional evidence to establish actual innocence:

**Christopher Miller:** In June 2018, Christopher Miller was exonerated after spending 17 years in prison after DNA testing revealed the identity of the person who actually committed the crime. *Ohio Innocence Project Client Exonerated After Spending 17 Years in Prison for a Crime DNA Proves He*

*Didn't Commit*, The Innocence Project.<sup>10</sup> In 2002, Miller was convicted of kidnapping, aggravated sexual assault and robbery and sentenced to 44 years in prison. *Id.* On the day after the crime, police located the victim's cellphone in Miller's possession, which made him the prime suspect. Miller claimed he'd purchased it from a stranger on the street in exchange for drugs and maintained his innocence. *Id.* The victim later identified him as one of her attackers. *Id.*

Pretrial DNA testing of the rape kit excluded Miller and revealed an unknown male profile. *Id.* The prosecutor argued that the unknown profile must've belonged to Miller's accomplice, since the victim claimed that two men had attacked her. *Id.* Miller was ultimately convicted based on the victim's identification of him and his possession of her cellphone. *Id.*

Two years after Miller's conviction, investigators matched the DNA from the rape kit to Richard Stadmire through the state's DNA database. *Id.* After the DNA implicated Stadmire, detectives interviewed both Stadmire and Charles Boyd, Stadmire's accomplice in a rape that occurred one month after the attack in this case. *Id.* Boyd told police that Miller and Stadmire had raped and robbed the victim while he waited outside as the lookout. *Id.* A jury convicted Stadmire and sentenced him to 43 years in prison; Boyd pled guilty and was sentenced to five years in prison. *Id.*

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<sup>10</sup> Available at <https://www.innocenceproject.org/ohio-innocence-project-client-exonerated-after-spending-17-years-in-prison/> (accessed on June 26, 2018).

In 2015, the Ohio Innocence Project requested that the rape kit be re-tested using advanced technology that was not available at the time of trial. *Id.* The testing revealed a second profile—in addition to Stadmire’s—belonging to Boyd. *Id.* The state then tested other items at the crime scene, which further confirmed Miller’s innocence. *Id.*

**Central Park Five:** After prolonged periods of police interrogation, five teenagers – Yusef Salaam, Kevin Richardson, Antron McCray, Raymond Santana and Korey Wise – confessed to being involved in the brutal attack and rape of a 28-year old jogger in New York’s Central Park. *Kevin Richardson Profile, The Innocence Project.*<sup>11</sup> At the time, the defendants were between 14 and 16 years old. Richardson, McCray, Sanatana, and Wise all gave videotaped confessions. In 1990, all five teenagers were convicted for the attack.

In early 2002, Matias Reyes, a convicted murderer and rapist, admitted that he alone was responsible for the attack on the Central Park jogger. Reyes had already committed another rape near Central Park days earlier in 1989, using the same modus operandi. Although the police had Reyes’s name on file, they failed to connect Reyes to the rape and assault of the Central Park jogger.

Evidence from the crime scene was subjected to DNA testing and corroborated Reyes’ confession. On December 19, 2002, on the

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<sup>11</sup> Available at <https://www.innocenceproject.org/cases/kevin-richardson/?searchterm=richardson> (accessed on June 26, 2018).

recommendation of the Manhattan District Attorney, the convictions of the five men were overturned.

**David McCallum and Willie Stuckey:** In 1986, David McCallum and Willie Stuckey, both 16 at the time, were convicted of murder, robbery, kidnapping and illegal use of a weapon after a man was abducted and murdered in Brooklyn, New York. *Exonerations in 2014*, The National Registry of Exonerations.<sup>12</sup> No physical or forensic evidence tied either teenager to the murder. They were convicted at separate jury trials and each was sentenced to 25 years to life. Stuckey died of a heart attack in prison in 2001 after 14 years behind bars. McCallum continued to appeal his case.

In 2011, McCallum's attorney asked the Kings County (Brooklyn) District Attorney to submit the case to his Conviction Review Unit. The District Attorney informed responded that the Conviction Review Unit had determined there was no credible evidence of innocence.

In November 2013, DNA tests were performed on cigarette butts and a marijuana roach that had been found in the victim's car. Neither Stuckey's nor McCallum's DNA was found, but a DNA profile that matched a man with a criminal record was developed. The reinvestigation also turned up evidence of alternate suspects who were known to police at the time of the initial

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<sup>12</sup> Available at [http://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2014\\_report.pdf](http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2014_report.pdf) (accessed on June 26, 2018).

investigation, but whose existence was not disclosed to the defense. In October 2014, the District Attorney moved the Kings County, New York, Supreme Court to vacate the convictions of both McCallum and Stuckey, and then dismissed the charges.

**Henry McCollum and Leon Brown:** Teenagers Henry McCollum and his half-brother Leon Brown were convicted of rape and murder in 1984 in North Carolina, and both were sentenced to death. *Exonerations in 2014*, The National Registry of Exonerations.<sup>13</sup> Under interrogation, both mentally-handicapped teenage defendants confessed to the crime.

In 2004, DNA testing was ordered on a cigarette butt found near the victim's body. A DNA profile was obtained; it did not match the DNA profiles of either Brown or McCollum. In 2010, the North Carolina Innocence Inquiry Commission began investigating the case at the request of Brown's attorneys. The Commission submitted the DNA profile from the cigarette butt to the North Carolina state police DNA database; it matched that of Roscoe Artis. Artis was serving a sentence of life in prison for a 1983 rape and murder. Further investigation revealed that Artis previously had been convicted for assaulting women and was wanted for an additional 1980 rape-murder.

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<sup>13</sup> Available at [http://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2014\\_report.pdf](http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2014_report.pdf) (accessed on June 26, 2018).

Based largely on this evidence, McCollum and Brown were exonerated in 2014 after nearly 31 years in prison.

**Jamie Peterson:** Jamie Peterson was convicted of rape and murder in Kalkaska, Michigan in 1996. On September 8, 2014, after he spent 17 years in prison for a murder and rape he did not commit, the trial court reversed his conviction on the basis of new DNA results. *See People v Jamie Lee Peterson*, No. 97-1707-FC, (46 Cir Mich Aug 14, 2014). The results not only fully excluded Peterson, but also matched another man, Jason Ryan, who has now been charged with the crime. *Id.* at 3-4.

At the time of Peterson's trial, the prosecution knew that male DNA recovered from the rape kit did not match Peterson, but argued to the jury that there must have been an unknown accomplice. *Id.* at 13. A semen stain on the victim's shirt was untestable with the technology available at the time of trial. *Id.* Peterson was convicted based on a series of questionable confessions he had made to the police. *Id.* at 15-18.

Peterson filed a petition for DNA testing under Michigan's Post-Conviction DNA testing statute that was opposed by the prosecutor and denied by the trial court in 2002 because the case against Peterson, "excluding the DNA evidence, was compelling." *Id.* at 3. However, in 2013 a new prosecutor agreed to submit the rape kit and the shirt stain for DNA testing. *Id.* at 3. The results proved that all the male DNA at the scene came from the same man, and

a CODIS search identified Jason Ryan, a convicted felon, as the source. *Id.* at 3-4. Without the new prosecutor's willingness to submit the evidence for testing, not only would Peterson still be in prison, Jason Ryan would have escaped prosecution.

The prosecution's resistance, and the trial court's unjustifiably narrow interpretation of the DNA testing statute in 2002, unnecessarily delayed both events by more than a decade.

**Douglas Warney:** Douglas Warney was convicted in 1997 of a violent stabbing, based in part on a confession he recanted at trial. *Warney v. Monroe County*, 587 F3d 113, 116–118 (2d Cir 2009). Police collected blood from underneath the victim's fingernails, as well as a towel and tissue that the perpetrator apparently cleaned up with. *Id.* at 116. At trial, the jury heard testimony that the blood on the towel and tissue did not belong to either Warney or the victim, but convicted him nonetheless. *Id.* at 118. In 2004, Warney sought to have the physical evidence subjected to DNA testing. *Id.* In opposing the testing, the prosecutor stated, “[t]he jury knew that there was blood in that house that didn’t belong to the victim or the defendant. And DNA testing isn’t going to tell you any more.” *Quest for Genetic Testing in Warney Case Rejected*, ROCHESTER DEMOCRAT AND CHRONICLE, December 17, 2004. Adopting that same reasoning, **the trial court denied Warney’s motion**

because testing “would not provide evidence which is significantly different from that submitted to the jury.” *Id.* at 118.

That, however, turned out to be untrue. While Warney’s appeal was still pending and without explanation, the prosecutor submitted the evidence for testing; a subsequent search of CODIS matched Eldred Johnson, a convicted murderer. *Id.* at 119. Further testing also revealed that a previously unidentified fingerprint at the scene also matched Johnson. *Id.* Johnson confessed and stated that he had acted alone. *Id.* Warney’s conviction was overturned and he was released from prison. *Id.*

**Jeff Deskovic:** After serving nearly 16 years of a 15 to life sentence, Jeff Deskovic was exonerated in November 2006 after post-conviction DNA testing proved his innocence. *Jeff Deskovic*, The Innocence Project.<sup>14</sup> In 1989, a 15-year-old girl disappeared after she went out to take pictures for a photography class. Days later, her body was discovered, along with her clothes and a cassette player. She had been raped, beaten, and strangled. Police focused their attention on then 16-year-old Deskovic because he was late to school the day after her disappearance. He allegedly confessed after six hours of extensive questioning and three polygraph sessions without a lawyer or parent present. At the time of the crime, semen was identified on the vaginal swabs from the victim’s rape kit, but DNA results excluded Deskovic. To explain this result,

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<sup>14</sup> Available at <https://www.innocenceproject.org/cases/jeff-deskovic/> (accessed on June 26, 2018).

the state argued it came from a consensual sex partner and that Deskovic killed the victim in a jealous rage. He was convicted of rape and murder.

In January 2006, the semen from the rape kit was tested with newer technology and the results were entered into the New York State DNA databank of convicted felons. The semen was matched to convicted murderer Steven Cunningham, who was already in prison for another crime. Cunningham subsequently confessed to the crime and Deskovic was released from prison.

**The Dixmoor Five:** The Illinois case of the Dixmoor Five resulted in five exonerations, despite the fact that all of the defendants were excluded from sperm found in the victim's underwear before trial. The case began when fourteen-year-old Cateresa Matthews went missing on her walk home from school in the Chicago suburbs. Joshua A. Tepfer, Laura H. Nirider, *Adjudicated Juveniles and Collateral Relief*, 64 Me L Rev 553, 568-69 (2012). Her body was found weeks later in a nearby grassy path: she had been raped and shot. *Id.* at 569. An informant told the police that his classmate, Jonathan Barr, told him that the victim had gotten in a car with him and two other teens, Robert Taylor and Robert Lee Veal, on the day she disappeared. *Id.* at 570. In police custody, Veal, who was mentally disabled, signed a statement admitting to participating in the gang rape of Matthews along with four other students: Taylor, Barr, Jonathan Harden, and Shainne Sharp. *Id.* Sharp also confessed after high-pressure police interrogations and all five were arrested and charged

with the crime. *Id.* Veal and Sharp pleaded guilty for lesser sentences and testified in the other cases. *Id.* at 572. The other three were convicted at trial, despite the DNA results excluding them from the sperm found in Matthews' underwear. *Id.*

In March 2011, a CODIS searched linked the DNA from the sperm sample to a 32-year-old man with a lengthy criminal record including sexual assault and armed robbery convictions. *Id.* A Cook County Circuit Court judge agreed to set aside the convictions of Taylor, Barr, and Harden in November 2011. *Id.* Veal and Sharps' guilty pleas were also vacated. *Id.* at 573.

**The Englewood Four:** In another Illinois case, four more people were exonerated under similar circumstances. *Background on Dixmoor and Englewood Cases*, The Innocence Project.<sup>15</sup> In 1994, a 30-year-old woman was found naked and strangled to death behind a house in the Englewood neighborhood of Chicago's South Side. A tip to police implicated five teens. After intense interrogations, the teens confessed. However, pre-trial DNA testing of semen found on the victim excluded all of them. Still, the prosecution moved forward with the prosecutions. Four of the teens were eventually convicted and sentenced to 30-40 years in prison. In May 2011, a complete DNA profile from the semen was compared to a national database at the request

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<sup>15</sup> Available at: <https://www.innocenceproject.org/background-on-dixmoor-and-englewood-cases/> (accessed June 26, 2018).

of the Innocence Project and other organizations. The profile implicated another man, now deceased, who had been connected to a series of violent assaults and murders. The State argued that any DNA match in this case would be inconclusive due to the lifestyle of the victim, who was known to engage in prostitution. However, the semen found in the strangled body of the victim was from a man that the Cook County State's Attorney's office had long believed was responsible for two strangulation-murders of prostitutes and violent assaults of at least five others. On November 16, 2011, a Chicago judge overturned the convictions of four men.

**Keith Cooper:** In 1997, Keith Cooper was convicted of robbery resulting in serious bodily injury and sentenced to 40 years in prison after he was believed to have been the gunman in a robbery. *Keith Cooper*, The National Registry of Exonerations.<sup>16</sup> The prosecution relied primarily on eyewitness testimony and a claim by a jailhouse informant that Cooper confessed to him. *Id.*

The gunman left a hat at the crime scene. DNA testing on the sweatband of the hat identified a profile that did not match Cooper. *Id.* Inexplicably, however, this evidence of exclusion was not presented to the jury. Further DNA tests on the hat showed that, not only did the DNA not belong to Cooper,

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<sup>16</sup> Available at <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5091> (accessed on June 26, 2018).

it belonged to a man who had been convicted in 2002 of attempted murder and was serving a 62-year sentence in a Michigan prison. In addition, the eyewitnesses and the jailhouse informant recanted their testimony.

Cooper was pardoned in 2017, but not before being wrongfully convicted and serving nine years in prison.

As these cases demonstrate, DNA testing can provide evidence of actual innocence, even in cases when other evidence of guilt appears strong. Put simply, modern DNA testing is capable of unparalleled accuracy and is the gold standard of forensic analysis:

“Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid–1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue \* \* \*. DNA testing has exonerated wrongfully convicted people, and has confirmed the convictions of many others.”

*District Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 US 52, 62 (2009).

According to the Circuit Court, Johnson’s theory that DNA testing would lead to the discovery of the person who murdered Sunny Thompson, “does not articulate how DNA testing would lead to a finding of actual innocence.” His

theory was “too attenuated,” and depended on a chain of “ifs.” But the cases above show that modern DNA testing is not a question of “if.” Developments in DNA testing and databases *have* led to the exoneration of innocent defendants who were excluded from previously tested evidence. For Mr. Miller, for the five young men falsely convicted of a brutal attack in Central Park, for Mr. Deskovic, convicted as a teen for a crime he did not commit, DNA testing was not attenuated, not uncertain, not a question of “if;” it was a certain, indispensable step to demonstrating their innocence and regaining their freedom.

## V. CONCLUSION

The disturbing reality of wrongful convictions motivated all 50 states and the federal government to enact post-conviction DNA testing statutes to ensure that if there is some piece of DNA evidence that can establish a person’s innocence, the evidence is tested. This Court should further the goals and purpose of Oregon’s statute—and the goals of justice overall—and reverse the

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Circuit Court's narrow interpretation of Oregon's Post-Conviction DNA Testing Statute.

DATED this 6<sup>th</sup> day of July, 2018.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND  
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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that, on July 6, 2018, I filed the foregoing **INNOCENCE NETWORK'S MOTION TO APPEAR *AMICUS CURIAE*** with the State Court Administrator by using the Court's electronic filing system. I served the same on the following parties by using the Court's electronic filing system:

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